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# Carol Greenwood v. Pleasant View City, a municipal corporation : Reply Brief

Utah Supreme Court


J. Paul Stockdale; Attorney for Plaintiff-Respondent.
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IN THE SUPREME COURT OF THE STATE OF UTAH

CAROL GREENWOOD,

Plaintiff-Respondent,

vs. Case No. 870391

PLEASANT VIEW CITY, a municipal corporation, Category No. 10

Defendant-Appellant.

# APPELLANT'S REPLY BRIEF

On Appeal from an interlocutory Order of the Second Judicial district Court In and For Weber County
The Honorable David E. Roth, Judge

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### POINT I

### WAIVERS OF IMMUNITY APPLY ONLY WHERE THE IMMUNITY IS QUALIFIED, NOT WHERE THE IMMUNITY IS ABSOLUTE

Respondent argues in her Brief that immunity is waived in the instant case by specific waivers set forth in the Governmental Immunity Act. See Brief of Respondent at 2-3. Such would be the case if the first paragraph of Section 63-30-3 of the Act were applicable here. The first paragraph of that section, however, does not apply. Rather, it is the second paragraph of Section 63-30-3 which is applicable to this case.

The Section, in its entirety, reads as follows:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.
>
> The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

Utah Code Ann. § 63-30-3 (1953, as amended). As can be seen by the clear, unambiguous and specific language of the second

paragraph of the section, repair and operation of flood and storm systems by a governmental entity are governmental functions for which absolute immunity attaches.

There is no language in the second paragraph suggesting that the qualified immunity of the first paragraph of the Section applies. Rather, very explicit and specific language in the second paragraph states clearly and graphically that for the particular, specific governmental functions listed there, that of management of flood waters and other natural disasters and the construction, repair and operation of flood and storm systems, an immunity with no qualifiers or waivers is applicable.

In Utah, principles of statutory construction require that specific provisions take precedent over general provisions. See Ute-Cal Land Development v. Intermountain Stock Exchange, 628 P.2d 1278, 1282 n.15 (Utah 1981); Millett v. Clark Clinic Corp., 609 P.2d 934 (Utah 1980). Here, the second paragraph's specific enumeration of particular types of governmental function, with clear language stating emphatically that immunity applies, takes precedent over the general provisions of the first paragraph.

Finally, where there is absolute immunity, no waivers are applicable. Only where the Act expressly allows a waiver, can a waiver be considered. See Madsen v. Borthick, 658 P.2d 627

(Utah 1983). Thus, where, as here, a governmental entity's repair or operation of a storm system allegedly caused injury, the applicable immunity is not qualified and the Act's waivers of immunity do not apply.

## POINT II

### LEGISLATIVE INTENT CAN BE DETERMINED FROM THE FACE OF THE STATUTE

Respondent asserts that the 1984 amendment which added the second paragraph of Section 63-30-3 to the Act "was intended as protection only in times of flood." See Brief of Respondent at 4. If such is the case, why then did the Legislature add superfluous language to the amendment giving immunity to the construction, repair and operation of flood and storm systems? If the amendment was intended to provide immunity only when flood waters were present, then "the construction, repair, and operation of flood and storm systems" during flooding conditions would be included within or encompassed by the plain and ordinary meaning of "management of flood waters."

The Legislature uses words and phases "advisedly," and such are to be given effect. West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982). The use of the conjunctive "and" after the phrase "management of flood waters and other natural disasters," followed by specific enumeration of the governmental

activities of constructing, repairing and operating flood and storm systems, indicates a clear intent to add to the statute activities different than those of managing flood waters.

The legislative intent is clear from the plain language of the statute. Immunity is granted to governmental entities while constructing or repairing or operating flood and storm systems prior to, after, in anticipation of, in response to, or to prevent or minimize damages from flooding. In an arid, desert state like Utah, flooding is likely to come from severe thunderstorms. The Legislature therefore included "storm systems" in the statute to allow for governmental activities specifically designed to deal with such, in addition to what otherwise might be done with regard to flooding in general. Incentive, or in other words, immunity from suit, is thereby provided governmental entities which make a concerted effort to avoid having to manage flood waters and be faced with the injury or damage that naturally occur from actual flooding, by constructing, repairing and operating flood and storm systems when flood waters are not present. These systems, by their nature, are designed to alleviate, minimize or prevent flooding.

The Legislature, in its wisdom, deemed such governmental functions to be worthy of unqualified immunity. Both respondent and the court below obviously disagree with that wisdom, but such disagreement cannot be the basis for the lower court

refusing to give effect to the literal wording and obvious meaning of the statute. See West Jordan, 656 P.2d at 446; Gord v. Salt Lake City, 20 Utah 2d 138, 434 P.2d 449, 451 (1967).

## POINT III

### DISTRICT COURT RULINGS WERE CITED TO SUPPORT THE ABSOLUTE IMMUNITY OF SECTION 63-30-3

In this appellant's Brief, numerous state District Court decisions were cited and attached as an appendix for the purpose of showing this Court that the second paragraph of Section 63-30-3 had been interpreted and applied by those courts as granting absolute immunity to governmental entities and employees for the governmental functions enumerated therein. Respondent skews the rulings of the lower courts in an attempt to find support for her assertion that the second paragraph of Section 63-30-3 applies only where flooding actually occurs. See Brief of Respondent at 5-7. At issue in those cases was the same legal issue posed here: whether the second paragraph of Section 63-30-3 grants absolute immunity to governmental entities for the management of flood waters and the construction, repair and operation of flood and storm systems. Universally, with the exception of the lower court in the instant action, the state's District Courts have ruled that absolute immunity does attach for those governmental functions.

None of the rulings cited dealt with the other issue presented here: whether flood waters must be present before Section 63-30-3 applies. This appellant did not cite the rulings as support for its argument on that specific issue, but rather for the argument that Section 63-30-3 does in fact grant immunity which is unqualified and absolute. Reliance on these lower court rulings for any other proposition here is unwarranted.

## POINT IV

### RESPONDENT DOES NOT DISPUTE THE PRINCIPLES OF STATUTORY CONSTRUCTION SET FORTH IN APPELLANT'S BRIEF

Nowhere in respondent's Brief does she dispute the legal principles of statutory construction as set forth and relied upon by this appellant in its Brief. The principles are sound and are dispositive here. The lower court, in denying this governmental entity's motion to dismiss, failed to apply these principles. Respondent failed to dispute them. The error of the lower court's interpretation of the statutory language, then, must now be corrected.

## CONCLUSION

For the reasons set forth herein, and in appellant's Brief, the lower court's denial of Pleasant View City's motion to

dismiss should be reversed and the matter should be remanded to the District Court for dismissal of plaintiff's complaint.

DATED this 23rd day of March, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By _____
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SCMCCF154

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Appellant's Reply Brief by mailing four copies to J. Paul Stockdale, attorney for respondent, 2605 Washington Boulevard, Suite 340, Ogden, Utah, 84401, this 23rd day of March, 1988.

SNOW, CHRISTENSEN & MARTINEAU

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